

December 20, 2006

Kent County - Civil Division (739-7641)

Ms. Rachel Kipp
Reporter
The News Journal
P.O. Box 15505
Wilmington, DE 19850

**RE: Freedom of Information Act Complaint
Against University of Delaware**

Dear Ms. Kipp:

On December 4, 2006, our Office received your letter alleging that the Executive Committee of the Board of Trustees of the University of Delaware ("the Executive Committee") violated the Freedom of Information Act, 29 *Del. C.* Ch. 100 ("FOIA"), by meeting on November 29, 2006 to approve the election of Dr. Patrick Harker as the new University President without giving notice to the public as required by FOIA.¹

By letter dated December 6, 2006, our Office asked the University's legal counsel to respond to your complaint by December 18, 2006. We received the University's response by facsimile on

¹ Because of a potential appearance of a conflict of interest, Attorney General Danberg did not participate in the preparation or review of this opinion.

December 18, 2006.

According to the University, "FOIA does not apply to anything other than 'a meeting of the full Board [of Trustees]'" so the "Executive Committee was under no duty under FOIA to open its meeting to [the public]." According to the University, the full Board of Trustees met in public session on December 11, 2006 with notice to the public and "with the full Board's action in public session on December 11, Dr. Harker's election to the Presidency is undoubtedly FOIA compliant."

RELEVANT STATUTES

FOIA requires that "[e]very meeting of all public bodies shall be open to the public except those closed" for executive session as authorized by statute. 29 *Del. C.* §10004(a).

FOIA defines a "public body" to include any "board, bureau, commission, department, agency, committee, ad hoc committee, special committee, temporary committee, association, group, panel, council or any other entity or body established by an act of the General Assembly of the State, or established by any body established by the General Assembly of the State, or appointed by any state governmental entity, which: (1) Is supported in whole or in part by any public funds; or (2) expends or disburses any public funds, including grants, gifts or other similar disbursements and distributions; or (3) is impliedly or specifically charged by any other public official, body, or agency to advise or to make reports, investigations or recommendations." *Id.* §10002(c).

FOIA, however, also provides that the definition of a "public body" shall not include "activities of the University of Delaware, . . . except that the Board of Trustees of the University .

. . shall be [a] 'public bod[y],' . . . and each meeting of the full Board of Trustees . . . shall be a 'meeting.'" 29 *Del. C.* §10002(d).

LEGAL ANALYSIS

In *Att'y Gen. Op.* 00-IB08 (May 24, 2000), a citizen complained to our Office that the University violated FOIA by meeting to approve a land transfer without notice to the public. We observed that Section 10002(d) of FOIA "exempts the University from the open meeting requirements except for a 'meeting of the full Board of Trustees.'" In that case, the record showed that

the full Board of Trustees did not meet to discuss or consider or approve the transfer of University land to New Road LLC, but rather that decision was made by the Executive Committee of the Board. For most public bodies, the open meeting law also covers any 'committee' of the public body. *See* Section 10002(a). While Section 10002(d) states that the Board of Trustees is a public body, it also states that only meetings of the '*full*' Board of Trustees (emphasis added) shall be a 'meeting' as that term is defined in Section 10002(b). Therefore, any meeting of a committee of the full Board of Trustees is exempt from the public meeting requirements of FOIA.

In *Att'y Gen. Op.* 00-IB08, our Office determined "that the University did not violate the open meeting requirements of FOIA because the decision to approve the land transfer to New Road LLC was made, not by the full Board of Trustees, but rather by the Executive Committee of the Board. Because the Executive Committee is not a 'public body' for purposes of FOIA, the Committee was

not required to hold its meeting in public."

For the same reasons, we determine that the Executive Committee did not violate the open meeting requirements of FOIA when it met in private on November 29, 2006 to approve the election of Dr. Harker as the new University because the Executive Committee is not a "public body" for purposes of FOIA. The open meeting law applies only when the full Board of Trustees meets.

In its December 18, 2006 response, the University states that "Chairman Cosgrove has appointed a committee of the Board and asked that it examine all of the Board's procedures and make recommendations to ensure FOIA compliance in all its future activities. To the extent that the Board wishes to go beyond legal compliance and consider its policy regarding Executive Committee's meetings, it will do so with the advice of this committee." We commend that University for its commitment to compliance with FOIA and for its consideration of public transparency beyond what the statute requires.

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CONCLUSION

For the foregoing reasons, we determine that the Executive Committee did not violate the open meeting requirements of FOIA when it met on November 29, 2006 to approve the election of Dr. Harker as the new University President because the Committee is not a "public body" as defined by FOIA.

Very truly yours,

W. Michael Tupman
Deputy Attorney General

APPROVED

Lawrence W. Lewis, Esquire
State Solicitor

cc: The Honorable Carl C. Danberg
Attorney General

Malcolm S. Cobin, Esquire
Chief Deputy Attorney General

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